IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 19, 2006 Session

STATE OF TENNESSEE v. ROY D. WAKEFIELD

Appeal from the Circuit Court for Williamson County
No. I-01057 Russ Heldman, Judge

No. M2005-01136-CCA-R3-CD - Filed June 29, 2006

A Williamson County Circuit Court jury convicted the defendant, Roy D. Wakefield, of rape of a child, a Class A felony. The trial court sentenced him to serve twenty-three years at one hundred percent in the Department of Correction. On appeal, the defendant contends (1) that the evidence was insufficient, (2) that the trial court erred in commenting on the credibility of the victim, (3) that the trial court erred in allowing an unrelated hearing to interrupt the trial, (4) that the trial court erred in allowing a witness to testify about her conclusions about marks on the victim, (5) that the trial court erred in refusing to answer the jury's question on the ranges of punishment, and (6) that the trial court erred in rushing the jury to reach a verdict. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Dale M. Quillen and Kenneth Quillen, Nashville, Tennessee (on appeal); and Glenn R. Funk, Nashville, Tennessee (at trial), for the appellant, Roy D. Wakefield.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Ronald L. Davis, District Attorney General; and Mary Katharine White, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case relates to events involving the defendant's eleven-year old granddaughter. At the trial, the victim testified that she had two sisters and two brothers. She said that the defendant was her grandfather and that she did not know him very well. She said that the defendant lived with his mother and that she and her two sisters went over to the defendant's mother's house to spend the night with the defendant. She said that one of her sisters went to bed early and that she and her other sister remained with the defendant. She said that the defendant gave them beer and cigarettes and

that the defendant was drinking beer. She said she drank four sips of beer and then poured out the rest.

The victim testified that they were sleeping in a tent and that the defendant was lying between her and her younger sister. She said her older sister was lying on her other side. She said that around 2:30 a.m. the defendant "started taking off my bathing suit" and "started jabbing me in my private" with two fingers. She said her private meant her "pee hole." She said it "hurt really bad" when the defendant was touching her. She said the defendant also "started backing me up and started to sort of hump me." She said that the defendant's "belly was sort of toward my back" and that the defendant had his clothes on. She said she got up about ten seconds after the defendant had touched her, and she went to the bathroom. She said it "hurt so bad" to use the bathroom. She said that when she returned to the tent, she changed places and lay beside her younger sister, because she thought the defendant was going to do the same thing to her sister.

The victim testified that the next morning, she told her sisters what had happened. She said she then confronted the defendant, but he denied that it had happened. She then told him that she could have dreamed it. She said the defendant took her home, and he told her mother that she had accused him of touching her. She said her mother then asked her if it was true. She said she told her mother that he did. She said her mother told her the defendant could get into trouble. She said she was scared and told her mother that he did not do it. She said that she and her mother went inside the house and that she began crying because she was afraid of the defendant. She said she first told her step-father what had happened, then told her mother and her uncle. She said that her uncle called the police and that she had to go to two doctors.

On cross-examination, the victim testified that her mother would ground her as punishment. She denied her mother was violent but acknowledged that earlier in the year, the police came to her house because her mother had hit her sister, caused two gashes in her sister's head, and pulled her sister's hair out. She acknowledged telling the police officers that her mother had threatened to hurt her sister even more after the police left. She acknowledged getting scared when her mother hit her sister and pulled her sister's hair out. She acknowledged not wanting her mother to get mad at her.

The victim acknowledged it was hot on the night of the incident but said there was plenty of room in the tent for all of them. She acknowledged she did not open her eyes, did not make any sounds, and did not tell her grandfather to stop when he was touching her. She said that the touching lasted about two minutes but that the defendant stopped because her sister was waking up. She said she kept her legs close together while the defendant was touching her. She said that the defendant pulled her bathing suit up, that he tried to pull her towards him, and that he "humped" her. She acknowledged the defendant did not take off his clothes and did not unzip his pants.

The victim acknowledged that she lay between the defendant and her younger sister when she returned from the bathroom and that she fell asleep in five to fifteen minutes. She acknowledged not waking up her sisters and not trying to get them out of the tent. She admitted that her older sister did not believe her when she first told her the defendant had hurt her. She said her sister said she

might have dreamed it. She admitted that when she first made the accusation to the defendant, she said "I must have dreamed it." She acknowledged the defendant immediately said he would never do that. She said that they ate breakfast and that the defendant took them swimming. She said that they did not swim long and that the defendant took them home. She acknowledged telling her mother that she dreamed the defendant touched her. She acknowledged telling her story had earned her praise from authority figures. She acknowledged that if her mother caught her telling a lie, she would be in a lot of trouble.

On redirect examination, the victim testified that she felt safe after the defendant left her house and that she then told her mother the truth about what had happened. She said she did not dream this happened because she was awake when the defendant molested her.

Cheryl Wakefield testified that the defendant was her father-in-law and that the victim, her daughter, was twelve years old and in special education classes. She said her daughters did not have a relationship with the defendant until the summer of 2003. She said her daughters spent the night with the defendant one time in July 2003. She said that the defendant brought the girls home the next day and that he told her the victim had accused him of touching her. She said that he told her about this in front of the victim and that she asked the victim about it. She said the victim told her she had dreamed it. She said she yelled at the victim and told the victim she should not tell stories because she could get him into a lot of trouble. She said that the victim apologized to her but that after the defendant left, the victim was fidgeting and was upset. She said that the victim told her it was not a dream and that the defendant did touch her. She said the victim was crying and said she was too scared to tell before the defendant left. She said that she called the police and that they took the victim to Williamson Medical Center and then to General Hospital.

On cross-examination, Ms. Wakefield acknowledged that she spanked her children in the past but that she grounds them to punish them. She acknowledged hitting her older daughter, causing gashes in her head, and pulling her hair. She said her daughter had cursed her and hit her. She admitted going to jail over the incident. She acknowledged that the defendant told her about the allegations before the victim did and that the victim said she had dreamed it. She acknowledged the victim told the social worker at Our Kids Center that she had suicidal thoughts in the few months before the incident. On redirect examination, Ms. Wakefield testified that the incident between her and her older daughter occurred after the events between the victim and the defendant.

Williamson County Sheriff's Detective Tameka Sanders testified that in July 2003, she was a patrol deputy and was dispatched on July 7, 2003, to the victim's home. She said that when she arrived, she saw a Metro officer holding a carbine rifle and standing in front of the house. She said the officer told her the offender was supposedly coming back with a gun. She said she took Ms. Wakefield and the victim to Williamson Medical Center because it was a more secure environment. She said she then took Ms. Wakefield and the victim to Our Kids Center, where a medical examination could be done. She said she was with the victim at Williamson Medical Center when the victim told the nurse about what had happened. She said the victim was not distraught and was "kind of matter-of-fact." She said she was not in the room with the victim at Our Kids Center when

the victim was interviewed. She said the victim had told her and the nurse that it hurt to urinate because her grandfather had placed his fingers in her "pee hole." On cross-examination, Det. Sanders acknowledged that a rape kit had been done on the victim and that she had transported the rape kit to the sheriff's department.

Martha Alexander testified that she was an emergency room nurse at Williamson Medical Center and met with the victim on July 7, 2003. She said the victim said that her grandfather had put his fingers inside of "the part I pee from" and that she felt burning during urination. She said that the victim told her there was no wetness between her legs and that wetness would have indicated DNA may have been present. She said she did not do a pelvic exam on the victim because the victim was only eleven years old. She said that someone who specialized in pediatrics would have to do that exam and that they sent the victim to General Hospital where someone from Our Kids Center could examine the victim.

On cross-examination, Ms. Alexander testified that the victim's mother was not present when she talked with the victim. She acknowledged that the victim said the defendant stopped when her sister "woke up," not that her sister was "half waking up," and that the victim did not say the defendant assaulted her in a different way after her sister woke up. She acknowledged the victim also told her "he put his thing in my butt."

Phyllis Thompson testified that she was a licensed clinical social worker for Our Kids Center and met with the victim on July 7, 2003. She said she spoke with the victim alone and spoke to Ms. Wakefield alone. She said she had to adjust some of her questions to the victim because the victim was developmentally delayed. She said the victim told her that her grandfather had put his fingers in her "pee-pod" and his "private spot was in the crack of my butt and he kept scooting me over to hump me." She said the victim's interview at Our Kids Center was for the purpose of medical diagnosis and treatment.

On cross-examination, Ms. Thompson acknowledged the victim told her that when the victim got mad she had thoughts of killing herself. She acknowledged she recommended the victim receive counseling regarding the sexual abuse allegations and the suicidal thoughts.

Carolyn Smeltzer testified that she was a nurse practitioner at Our Kids Center. She said she was a nurse with an advanced practice degree who could diagnose and treat common and chronic illnesses. She said that before she performed the victim's examination, she went over the information Ms. Thompson had collected. She said the victim had reported that "her genital area had been penetrated with fingers and that a penis had been rubbed on her bottom." She said the victim also reported she had pain during urination.

Ms. Smeltzer testified that she tailored the exam to address what the victim reported. She said the victim's posterior fourchette, a skin surface on the outer part of the genital area, and the victim's fossa, a mucosal surface near the fourchette, were reddened, "scrubbed kind of raw," and there was a small break in the skin between the two areas. She acknowledged that a small break

could be caused by something other than sexual abuse but that the injury would cause concern because it may indicate sexual abuse. She said that the victim returned for a follow up visit and that the injury was gone, meaning it was not something she had all the time. She said the most likely explanation for this type of injury was "some sort of force on that part of her body that caused that bleeding underneath the skin." She said she also found a "very distinctive red spot on [the victim's] hymen." She said that the area next to the hymen was very reddened and that it was the injury that caused her the most concern because it could have been from sexual abuse. She said this area was internal. She said that because this was the first time she saw the victim, she did not know if the redness was from a vascular lesion the victim would always have. She said that the victim returned for a follow up visit and that the injuries were gone, meaning they were not something she had all the time. She said she did not perform the re-examination. She said her exam of the victim's bottom was normal.

Ms. Smeltzer testified that the findings from the medical exam were consistent with what the victim had reported. She said a medical team of four nurse practitioners and one pediatrician who worked at the center reviewed the victim's case and concluded the red marks on the initial exam, which were present on the first exam but not on the second exam, indicated the injuries were recent. She said the significance in their conclusion was that the most likely cause of the red marks was trauma, although they could not determine what exactly caused the injury. She said the injuries were consistent with digital penetration.

On cross-examination, Ms. Smeltzer acknowledged a doctor from Our Kids Center had not examined the victim. She acknowledged that the victim's hymen was intact and that the break in the skin was near the posterior fourchette. She acknowledged the physical exam standing alone was not definitive that the injury was from sexual abuse. She said that the injury beside the hymen was two to three millimeters in diameter and that the small break near the posterior fourchette was three millimeters in diameter. She acknowledged the victim had reported experiencing frequent genital itching. She acknowledged it was possible scratching by the victim could have caused the external injury but was "much less likely" to have caused the internal injury. She also acknowledged it was possible, but unlikely, the injury to the posterior fourchette was caused through masturbation or a reaction to a chemical irritant. She acknowledged that the nurse who performed the second examination did not take a good photograph of the victim's hymen where the injury was found on the first examination but that the nurse found "the lesion was gone." She acknowledged she was not a doctor.

On redirect examination, Ms. Smeltzer testified that it was unlikely the victim could have caused the hymenal injury by scratching herself. She testified that she had seen injuries on the posterior fourchette in other young girls who complained of frequent genital itching but that she had not seen the hymenal injury the victim had on other young girls who were complaining of genital itching.

On re-cross examination, she acknowledged she did not ask the victim whether she scratched herself. She acknowledged the blunt force injury could have been caused by a "man's fingers," a "child's fingers," or the "inartful application of a tampon."

Holly Gallion testified that she was a pediatric nurse practitioner at Our Kids Center and that she examined the victim on September 2, 2003. She said the victim returned to the center for a recheck after she had been evaluated two months earlier by Ms. Smeltzer. She said Ms. Smeltzer was sick that day and could not re-examine the victim. She said that before she examined the victim, she reviewed Ms. Smeltzer's written report and the slides from the first exam. She said that the victim's hymen appeared normal on the second exam and that the area of redness noted in the previous report was gone. She said the most likely cause of an injury like the victim's to the hymenal area would be from something penetrating the body. She said the hymenal injury was not something that is often seen as a result of scratching.

On cross-examination, Ms. Gallion acknowledged that she was not a doctor. She acknowledged the photographs she took during the second exam did not clearly show the areas where the injuries had been found during the first exam. She acknowledged she knew in September 2003 that the photographs she took did not show what she saw in the second examination. She said they did not ask the victim to submit to another exam in order to obtain more photographs because she did not rely on the photographs in making her diagnosis.

Williamson County Sheriff's Department Detective Grant Benedict testified that he was the detective assigned to this case. He said he arranged to meet with the defendant to take a statement from him. He said that on July 10, 2003, he picked up the defendant and drove him to the Sheriff's Department. He said that the defendant was cooperative and that he tape recorded the defendant's statement. He said that he asked all the questions he wanted to ask and that the defendant answered them. He said that he sent the rape kit to the Tennessee Bureau of Investigation (TBI) and that the rape kit results were negative for semen. He said he did not attempt to take fingernail scrapings from the defendant because the interview was four days after the incident. He acknowledged that he interviewed the victim and that one of the girls asked the defendant to sleep in the tent with them.

On cross-examination, Detective Benedict testified that he interviewed the victim a week after the incident and that her testimony at the trial was consistent with what she told him in the interview. He said that after July 10, 2003, the defendant was not cooperative. On redirect examination, Det. Benedict acknowledged that there were some discrepancies in the victim's testimony.

I. SUFFICIENCY OF THE EVIDENCE

The defendant asserts that the jury had doubts about the victim's credibility as evidenced from its request for an instruction on the range of punishment for attempted rape. The defendant asserts the state had no incriminating physical evidence. The defendant asserts the nurses testified that the red marks could have been intentional or self-inflicted. The defendant contends the trial court's statement that the victim "had been through enough" buttressed the victim's testimony. The state responds that the evidence was more than sufficient to warrant the verdict. The state asserts the jury accredited the victim's testimony and rejected the defendant's denial of having touched the

victim at all. The state argues the jury requested the range of punishment for all of the offenses and used attempted rape as an example.

Our standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). We do not reweigh the evidence; rather, we presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions about witness credibility are resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

"Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." T.C.A. § 39-13-522(a). A rape victim's uncorroborated testimony constitutes sufficient evidence. See Montgomery v. State, 556 S.W.2d 559, 560 (Tenn. Crim. App. 1977).

At the trial, the victim testified that the defendant "jabbed" his fingers into her vagina and that the "jabbing" was painful. The victim consistently stated the defendant penetrated her vagina with his fingers when questioned by her mother, the police officers, the nurses, and the attorneys. The evidence showed the victim had a red spot on her hymen, redness in the area near the hymen, and a small break in the skin near the posterior fourchette. Carolyn Smeltzer testified that the injuries were consistent with digital penetration. We conclude that a rational trier of fact could have found the defendant guilty beyond a reasonable doubt of rape of a child.

II. TRIAL COURT'S COMMENTS

The defendant contends that the trial court erred in commenting to the jury that the victim "had been through enough." The defendant asserts that immediately after the trial court's comment, the victim testified that she felt the defendant's finger "inside of me." The defendant argues the trial court's statement validated and approved the victim's testimony. The defendant argues the jury questioned the victim's credibility because it requested the range of punishment for attempted rape.

The state responds that the trial court's statement did not comment on the credibility of the victim or the weight of the evidence. The state asserts that when the comment is read in context, the trial court's admonition was directed at the prosecuting attorney whose redirect examination of the child victim was somewhat hampered by the victim's failure to remember details. The state asserts that the victim's direct and cross-examination lasted two days and that on the second day, the prosecutor conducted a redirect examination in which the victim had difficulty in explaining what she felt when the defendant "humped her from behind." The state asserts the trial court's comments came after admonishing the prosecutor to ask new questions and after the defendant objected to the line of questioning. The state argues the trial court's statements were prompted by the difficult

redirect examination and the trial court's concern that the child victim had endured a rigorous day of testimony the day before.

On redirect examination, the prosecutor asked the victim how the defendant's penis felt against her. The victim stated she could not remember but the prosecuting attorney continued to question her about it. The trial court interjected stating

> All right. I think . . . she doesn't need to be pressured into saying something she can't say. She just says she can't remember, it's been a while.

The prosecuting attorney then returned to the same line of questioning. The defendant's attorney objected, and the trial court sustained the objection.

> [COURT]: I thought you were going to ask her some new kinds of questions, General, and I think this has been covered. I'm just a little bit concerned about - -
>
> [STATE]: It's a redirect, redirect questions from what [the defendant's attorney] brought out as far as a penis.
>
> [COURT]: All right. Well, I mean, okay, you can ask questions that are new, but once she gives an answer, with all due respect to her, let's move on to the next question.
>
> [DEFENSE]: Judge, [the General] had an opportunity to redirect yesterday. There was no recross. We've allowed her another chance to redirect. I agree with the Court that it ought to be topics that are new. I also think that the witness should testify instead of prosecutor [sic] testifying.
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> [COURT]: She -- the prosecutor is not testifying.
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> [DEFENSE]: And when the prosecutor says -- she needs to ask non-leading questions.
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> [COURT]: She just needs to ask non-leading questions, okay, about this.
>
> [DEFENSE]: And if she testifies and says yes and ask for a yes or no question, then she's doing the testifying for her own witness.

> [COURT]: I'll handle this. I'm make [sic] sure . . . there is a rule that says the judge is to make sure there's no abuse of the interrogation process and I don't think [the General] is intending to do that, but we have a young lady here that's been through enough, so let's be gentle, all right?

The prosecutor then changed her line of questioning and questioned the victim about the defendant penetrating her with his fingers.

The Tennessee Constitution prohibits judges from commenting on the evidence in a case. Tenn. Const. art. VI, § 9. A trial judge is obligated to "be very careful not to give the jury any impression as to his feelings or to make any statement which might reflect upon the weight or credibility of evidence or which might sway the jury." State v. Suttles, 767 S.W.2d 403, 407 (Tenn. 1989). We note that the defendant did not object to the trial court's statement and did not request a jury instruction to negate any impression the trial court's statement might have made on the state's case. Such failures constitute a waiver of this issue on appeal. Kelly v. State, 477 S.W.2d 768, 770 (Tenn. Crim. App. 1972); T.R.A.P 36(a). Therefore, the defendant has waived this issue.

This court may however, in the interest of justice, recognize plain error existing in the record. See Tenn. R. Crim. P. 52(b); T.R.A.P. 36(b). Rule 52(b) of the Tennessee Rules of Criminal Procedure provides

> (b) Plain Error. – An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice.

Our supreme court "has developed five factors to consider when deciding whether an error constitutes 'plain error' in the absence of an objection at trial: '(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is necessary to do substantial justice.'" State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). In order for this court to reverse the judgment of a trial court, the error must be "of such a great magnitude that it probably changed the outcome of the [proceedings]," and "recognition should be limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial." Adkisson, 899 S.W.2d at 642.

The first factor is satisfied because the record clearly establishes what occurred in the trial court. Turning to the second factor, we recognize that it was possible the trial court's comment that the victim had "been through enough" could have been interpreted by the jury to include the rape about which the victim testified. However, we conclude the comment, in context, did not breach a

clear and unequivocal rule of law. See, e.g., State v. Robert D. Walsh, No. W1999-01473-CCA-R3-CD, Shelby County, slip op. at 11-12 (Tenn. Crim. App. Jan. 30, 2001) (concluding that an unequivocal rule of law was not breached when the trial court stated after the defendant's wife testified that "It's quitting time. I want you back in here in the morning. See you're a good jury. You listen to everything. Whether it's real or not"). When read in context, the trial court's comment was made to admonish the prosecutor and to ensure there was "no abuse of the interrogation process." We conclude plain error does not exist.

III. UNRELATED HEARING

The defendant contends that he was denied a fair trial by the trial court's conducting an unrelated probation violation hearing while leaving the jury in the courtroom.[1] He argues the probation violation hearing was irrelevant and prejudiced the defendant by suggesting to the jury that probation was a possibility if the jury elected to convict on a lesser included charge. He asserts the trial court compounded the error by not instructing the jury that all cases are not eligible for probation or parole. The defendant contends Tennessee Code Annotated section 40-35-201(b), which abolished the defendant's right to a jury instruction on the range of punishment, interferes with the defendant's rights to a fair trial under the federal and state constitutions.

The state responds that the brief interruption of the trial did not prejudice the defendant. The state asserts that the defendant failed to include the transcript of this hearing and that it is not clear if the hearing was a probation violation hearing or a plea to a suspended sentence because the defendant refers to both types of proceedings in his brief. The state contends appellate review is precluded for failure of the defendant to include the transcript in the record. The state argues the defendant points to no prejudice but merely speculates that the jury could have been influenced by any mention of the possibility of a sentence of probation. The state also argues the defendant has waived the issue for failure to cite to any authority for his claim of error other than his general reference to the federal and state constitutions.

The record reflects that during the cross-examination of Carolyn Smeltzer, the trial court recessed the proceeding to take a plea and left the jury in the courtroom. Upon completion of the separate hearing, the defendant's attorney requested the trial court to instruct the jury.

> [DEFENSE]: Judge, I appreciate that the Court instructed this jury that this is a completely separate matter we just witnessed. I would ask that the Court instruct the jury that probation is not a sentencing option for all charges.
>
> . . . .

[1]The defendant refers to this hearing in his brief as both a probation violation hearing and a guilty plea hearing that involved a suspended sentence. The record does not reflect what type of hearing was held.

> [COURT]: No. Overruled. I told the jury that . . . this is open court. The Tennessee Constitution says open courts and what happens happens. We've got to be able to handle more than case [sic] at a time, that's reasonable. Nothing that occurred in here has anything to do with this case.
>
> Everybody on the jury raise their hand [sic] that they understand the Court's instruction to disregard all that with regard to this case and everybody raised their hands in the affirmative.

We note the transcript does not contain the unrelated hearing and the record does not reflect what kind of hearing the trial court conducted. The defendant refers to the hearing as a probation hearing and as a guilty plea hearing. The defendant states in his brief that

> Previous counsel, that is, [appointed counsel] requested a transcript of the probation hearing: "Special Instructions: Need trial testimony ASAP; also need transcript of any proceeding taking place in front of this jury other than the trial itself," (TR, p. 165) however that transcript is not part of the record. (TR, pp. 174-175).

It is the duty of the defendant to prepare a fair, accurate, and complete record on appeal to enable meaningful appellate review. See T.R.A.P. 24(a). "Generally, this court is precluded from addressing an issue on appeal when the record fails to include relevant documents." See id.; State v. Robinson, 73 S.W.3d 136, 154 (Tenn. Crim. App. 2001) (citing State v. Bennett, 798 S.W.2d 783 (Tenn. Crim. App. 1990)). The appellate court is limited to review of only the facts set forth in the record. See T.R.A.P. 13(c). If the record on appeal is deficient by not including a record of actions which are relevant to the issue, then this court may presume that the trial court's determinations were adequately supported by the evidence. See Smith v. State, 584 S.W.2d 811, 812 (Tenn. Crim. App. 1979). The trial court instructed the jury that nothing in the unrelated hearing had anything to do with this case. The trial court asked the jurors if they understood the instruction, and all jurors answered affirmatively. The absence of any transcript of what occurred at the separate hearing in the record requires that we presume the trial court's determinations were correct. The defendant is not entitled to relief on this issue.

Additionally, the state argues that the defendant waived this issue for failing to cite any authority for his claim other than his general reference to the constitution. The defendant cited to the Sixth Amendment, the Fourteenth Amendment, the Tennessee Constitution, and Tennessee Code Annotated section 40-35-201. We conclude that these references to authority were sufficient to avoid waiver.

IV. NURSE'S TESTIMONY

The defendant contends that the trial court erred in allowing Carolyn Smeltzer to testify about her conclusions as to the cause of the marks on the victim. The defendant contends the trial court erred in allowing Ms. Smeltzer to testify that genital itching does not cause hymenal red marks over the defense's objection to relevance and objection that such testimony required expert knowledge. The defendant asserts that Ms. Smeltzer was not a doctor and that nothing in the record shows she had any general training in obstetrics or gynecology. The defendant also asserts no proof is in the record about the number of purported sexual abuse victims she had examined. The defendant contends she was not qualified to make forensic medical determinations about the cause of the red marks.

The state responds that the trial court correctly allowed Ms. Smeltzer to testify that the victim likely did not cause her own injury. The state contends the defendant waived this issue for failing to cite to any authority to support his argument that expert testimony was necessary for this conclusion. The state asserts that the defendant's motion for a new trial objects to Ms. Smeltzer's testimony about her conclusions as to the source of the victim's injuries but that the record reflects she concluded that the injuries were consistent with the victim's description of digital penetration and that the victim, not Ms. Smeltzer, testified about the source of the injuries. The state contends the trial court did not abuse its discretion in ruling Ms. Smeltzer could testify under the "lay opinion rule." The state contends her answers to the questions were not opinions "but were well within Ms. Smeltzer's experience examining young girls who complained that they had been sexually abused." The state also contends her testimony helped the jury to understand how the victim sustained the injuries.

During the testimony of Ms. Smeltzer, the state asked questions about genital itching and the injury to the victim. The following exchange occurred:

> [STATE]: Now, in question number two, if she responded to frequent genital itching with frequent genital scratching she could have caused this injury herself. We talked about this on direct examination; is that right?
>
> [WITNESS]: Yes.
>
> [STATE]: You said it's possible but not likely; isn't that right?
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> [WITNESS]: Correct. Especially the hymenal lesion.
>
> . . . .
>
> [STATE]: And why is it not likely?

[WITNESS]: Well because when somebody is scratching themselves, they often don't scratch up inside their genital area. And they also don't typically injure themselves, like when you touch yourself a certain way and it hurts, you're going to stop doing that. So it is unlikely that she would cause . . .

. . . .

[STATE]: Have you examined other young girls that have complained of frequent genital itching?

[WITNESS]: Yes, I have.

The defendant objected to the question and argued it was not relevant. The trial court overruled the objection, and the state repeated the question. The defendant objected again, and the following exchange occurred.

[COURT]: What's the grounds?

[DEFENSE]: On the grounds that that has no relevance to the issues in this case.

[COURT]: Response.

[STATE]: Your Honor it does based upon the experience and expertise of this witness, who . . . had a finding that the injuries here are consistent with the allegations made by the child. Her experience part of that being examination of other children that have complained of frequent genital itching goes to the basis for her opinion in this case.

Also, it will assist the jury that does not have the same specialized knowledge that this witness has in making an ultimate determination of fact.

. . . .

[DEFENSE]: Judge, number one, it is not relevant. Two, she's not been qualified as an expert in this area. Three, she's not a doctor. Four, this is not evidence of some learned treatise or a study that's been done. This is a

random sampling that I don't think would be appropriate.

[COURT]: If you want to say anything General, you can, before I rule.

[STATE]: Your Honor under the lay opinion rule, which is the wording that I was quoting from, therefore, [the defense attorney's] argument that she's not been declared an expert is not appropriate because under the lay opinion rule anyone that has specialized knowledge because of training and experience may assist the jury in making an ultimate determination of finding of fact.

. . . .

[COURT]: You don't have . . . that's not what the lay opinion rule says. Hold on.

That's not what the lay opinion rule says but it says other things that [cause] me to overrule the objection. So I find that . . . it is relevant and that the probative value is not going to outweigh any prejudicial effect.

Rule 701 of the Tennessee Rules of Evidence addresses the admissibility of opinion testimony of lay witnesses. It states in pertinent part:

> (a) Generally. – If a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are
>
> (1) rationally based on the perception of the witness and
>
> (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Rule 702 of the Tennessee Rules of Evidence addresses the admissibility of opinion testimony of expert witnesses. It states in pertinent part:

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

> knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Tennessee Rule of Evidence 703 requires the expert's opinion to be supported by trustworthy facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." The determining factor is "whether the witness's qualifications authorize him or her to give an informed opinion on the subject at issue." State v. Stevens, 78 S.W.3d 817, 834 (Tenn. 2002). Evidence constitutes "'scientific, technical, or other specialized knowledge,' if it concerns a matter that 'the average juror would not know, as a matter of course.'" State v. Murphy, 953 S.W.2d 200, 203 (Tenn. 1997) (quoting State v. Bolin, 922 S.W.2d 870, 874 (Tenn. 1996)). Questions regarding the admissibility, qualifications, relevancy, and competency of expert testimony are left to the discretion of the trial court. McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 263-64 (Tenn. 1997). A trial court's ruling on the admissibility of such evidence may be overturned on appeal only if the discretion is exercised arbitrarily or abused. Stevens, 78 S.W.3d at 832.

Initially, we conclude that Ms. Smeltzer's opinion regarding the injuries of the victim required specialized knowledge and therefore could not be a lay opinion. See Tenn. R. Evid. 701. The trial court found her opinion was admissible because it was probative and relevant because the lay opinion rule said "other things" leading the trial court to overrule the objection. We believe the trial court was incorrect in allowing the testimony under the lay opinion rule. However, we conclude the testimony was admissible as expert testimony.

Ms. Smeltzer testified that she received an associate's degree in nursing in 1986. She said she received her bachelor's degree in 1990 and her master's degree from Vanderbilt in 1991. She said she was certified as a family nurse practitioner in 1991 and as a pediatric nurse practitioner in 1995 or 1996. She said she worked at Our Kids Center where she provided medical evaluations for children who have made allegations of abuse. She explained the process of a medical evaluation at Our Kids Center and explained the detailed genital examination. It is evident Ms. Smeltzer was qualified as an expert in child sexual abuse in terms of her education, training, and experience with children. In addition, she testified that a review board consisting of four nurse practitioners and one pediatrician reviewed this case. The record reflects her opinion was based on her personal observations, specialized knowledge, and experience.

The record reflects that Ms. Smeltzer was qualified to testify as an expert witness in child sexual abuse and her opinion substantially assisted the jury in understanding the results of the victim's examination. Therefore, her opinion that the victim did not cause her own injuries through genital scratching was permissible pursuant to Rule 702. See State v. Frederick Leon Tucker, No. M2005-00839-CCA-R3-CD, Davidson County, slip op. at 8 (Tenn. Crim. App. Mar. 7, 2006) (concluding a nurse practitioner from Our Kids Center was qualified to testify as an expert witness); State v. Frankie Ledbetter, No. M2002-02125-CCA-R3-CD, Marion County, slip op. at 14-15 (Tenn. Crim. App. Aug. 7, 2003) (concluding a physician's assistant was qualified as an expert). Although

the trial court admitted the evidence for an incorrect reason, the evidence was admissible under the rules allowing expert testimony. The defendant is not entitled to relief on this issue.

V. JURY QUESTION

The defendant contends that the trial court erred in refusing to answer the jury's question regarding the range of punishment for the charges, specifically attempted rape of a child. He concedes Tennessee Code Annotated section 40-35-201(b) terminated a defendant's right to a jury instruction regarding the ranges of punishment. He argues subsection (a) allows an instruction on the ranges of punishment if failing to give the instruction would interfere with the defendant's constitutional right to a jury trial. He contends the trial court's refusal to instruct the jury, which witnessed an irrelevant probation violation hearing, denied the defendant a right to an impartial jury.

The state responds that the trial court correctly declined to answer the jury's question about the range of punishment for various offenses. The state argues that given the prohibition against giving such an instruction under Tennessee Code Annotated section 40-35-201(b), the trial court would have erred had it acquiesced to the jury's request to be told the range of punishment on all of the charges.

The record reflects that after the jury had retired for deliberations, it sent a written question to the trial court. The question stated

> Can we find out ranges of sentences for each charge brought before us? For example: how many years does attempted rape carry?

The trial court brought the jury into the courtroom and answered its question stating

> The response of the Court is that you've been given the complete legal jury charge at this time and it is complete, lacking in nothing, and the Court most respectfully declines to respond at all to those questions, with all due respect to the jury.

Tennessee Code Annotated section 40-35-201(b) states

> In all contested criminal cases . . . the judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on possible penalties for the offense charged nor all lesser included offenses.

The trial court correctly followed this statute when it denied the jury's request for the ranges of punishment. See State v. Leroy Nevils, No. M2002-00411-CCA-R3-CD, Williamson County, slip op. at 6-7 (Tenn. Crim. App. Apr. 4, 2003) (stating that in disallowing jury questions about potential incarceration during voir dire, the trial court did exactly as Tennessee Code Annotated section 40-35-

201(b) required). We conclude that the trial court did not err in declining to instruct the jury on the range of punishments and that the trial court merely followed the applicable law.

Additionally, the defendant contends that subsection (a) allows an instruction on the ranges of punishment if failing to give the instruction interferes with the defendant's constitutional right to a jury trial. The state has not responded to this contention. Subsection (a) states that nothing in the chapter "shall be construed to deprive a defendant of a right to a jury trial as to the defendant's guilt or innocence." T.C.A. § 40-35-201(a). The constitutional right to trial by jury does not include a constitutional right to jury determination as to the appropriate sentence to be imposed. See Hunter v. State, 496 S.W.2d 900, 902 (Tenn. 1972); see also Libbretti v. United States, 516 U.S. 29, 48-49, 116 S. Ct. 356, 367-68 (1995). The defendant does not specify why his case is different. We conclude the defendant's constitutional right to a trial by jury was not violated.

VI. TIME TO REACH VERDICT

The defendant contends that the trial court erred in forcing the jury to return a quick verdict by telling the jury at 5:49 p.m. on a Friday that if it did not reach a verdict in the next twenty-five minutes, the jury would have to return for deliberations the following Monday. He asserts that twenty-six minutes later, the jury returned a guilty verdict. He argues that the jury was considering the charge of attempted rape, that some consensus was building for the lesser verdict, and that the jury wanted some assurance as to the punishment after witnessing the unrelated probation violation hearing. He argues the trial court's statement gave the jury an ultimatum either to convict the defendant of the most serious charge or to come back the following Monday. He contends any undue intrusion by the trial judge into the exclusive province of the jury is error, citing State v. Torres, 82 S.W.3d 236, 254 (Tenn. 2002). He contends this coercion violated his due process rights and right to trial by jury under the Tennessee Constitution.

The state responds that the trial court did not force the jury to return a hurried verdict. The state also contends the defendant waived this issue for failing to object to the trial court's statement and for agreeing to the time deliberations would end. The state argues the defendant's reliance on Torres is misplaced because Torres involved a "dynamite charge" given to a deadlocked jury. The state asserts nothing in the record indicates that the jury was ever deadlocked. The state asserts that the defendant's claim that a consensus was building in the jury to convict on attempted rape was speculation and that the jury's question on the range of punishment for that offense was only an example given by the jury.

Before retiring for deliberations, the trial court gave its instructions to the jury. Part of the instructions included the following:

> Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous. As jurors it is your duty to consult with one another, and to deliberate with a view toward

> reaching an agreement if you can do so without violence to individual [judgment]. Each of you must decide the case yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.
>
> In the course of your deliberations do no hesitate to reexamine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of just returning a verdict. The presentment will be handed to you along with these instructions.

After the jury returned to the courtroom to hear the trial court's answer to its question regarding the range of punishment, the trial court answered the question and told the jury:

> I guess I need to tell you this, it is getting late in the day and this is what the Court has discussed with the lawyers, at the time that we started discussing it I was going to say that we are going to take 25 more minutes for today's proceedings, then at the end of 25 more minutes we will stop for the day and the next court date in this case will be Monday at 9:00.

The record reflects that the jury left the courtroom at 5:49 p.m. and returned with a verdict at 6:15 p.m.

We first address the state's contention that the defendant waived any issues regarding improper judicial comments for failing to make a contemporaneous objection. Relief is not available to a party "who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of the error." T.R.A.P. 36(a); see also State v. Robinson, 146 S.W.3d 469, 511 (Tenn. 2004) (concluding defendant waived the issue of improper prosecutorial comments for failing to make a contemporaneous objection). The record is devoid of any objections made by the defendant in response to the comments made by the trial court. In fact, the record reflects the attorneys agreed to the time to end deliberations for the day. The defendant has waived this issue. Furthermore, we conclude there is no plain error in the record before us.

CONCLUSION

Based upon the foregoing and the record as a whole, we affirm the judgment of the trial court.

_____

JOSEPH M. TIPTON, JUDGE